STATE OF MICHIGAN

COURT OF APPEALS

DR. TIMOTHY MEYER,

Plaintiff-Appellant,

v

OAKLAND COMMUNITY COLLEGE BOARD OF TRUSTEES, JOHN MCCULLOCH, SUSAN ANDERSON, SHIRLEY BRYANT, PAMELA DAVIS, and PANELA JACKSON,

Defendants-Appellees.

UNPUBLISHED
October 22, 2020

No. 350234
Oakland Circuit Court
LC No. 2019-172649-CZ

Before: GADOLA, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ.

PER CURIAM.

Plaintiff, Dr. Timothy Meyer, appeals by right the trial court's order granting summary disposition, pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10), in favor of defendants the Oakland Community College Board of Trustees (the Board) and the individual members of the Board. This matter arises out of the Board's termination of Dr. Meyer's position as chancellor of Oakland Community College (OCC). This is the second lawsuit Dr. Meyer has filed against defendants arising out of the same termination. *Meyer v Oakland Comm Col Bd of Trustees* ["*Meyer I*"], unpublished per curiam opinion of the Court of Appeals, issued January 7, 2020 (Docket No. 345738).[1] The trial court concluded that plaintiff's instant breach of contract claim (1) was barred by res judicata based on the resolution of the *Meyer I* action at the circuit court level, and (2) was independently barred by plaintiff's own conduct that constituted a waiver of the benefits he seeks. We agree with both conclusions, and we therefore affirm.

[1] During the pendency of the instant appeal, our Supreme Court denied plaintiff's application for leave to appeal this Court's decision in *Meyer I*.

I. BACKGROUND

This Court previously set forth a concise summary of the background to this matter, which is consistent with both parties' recitation of the facts:

> Defendants are comprised of the Oakland Community College Board of Trustees (the Board), and the specifically named board members acting in their official capacities as board members. Plaintiff is the former chancellor of Oakland Community College (OCC). He was hired as the chancellor pursuant to a January 1, 2012 contract which provided that it was effective for an initial three-year period, then automatically renewed unless terminated or converted to a fixed three-year term on or after January 1, 2017. The contract also contained specific provisions regarding requirements to terminate plaintiff.
>
> On May 16, 2017, the Board met held a meeting. After an open session, the Board adjourned into a closed session. When it returned to open session, the Board approved "the plan" presented in the closed session. After the session ended, plaintiff was verbally informed that his contract was being terminated by the Board. He thereafter received a letter informing him that he was being placed on paid administrative leave pending further notification of the Board. Plaintiff was sent a letter on May 22, 2017, indicating that his termination would be effective as of July 6, 2017. [*Meyer I*, unpub op at pp 1-2 (footnote omitted).]

The May 22, 2017, letter included the following paragraph:

> Provided termination of the Contract remains without just cause, and as a pre-condition for receipt of severance, you and the Board shall execute (and you shall not revoke) a mutual release of claims which can be waived by law. This release is required pursuant to paragraph 8.D. of the Contract.[2] We will be preparing and sending you a copy of such a release shortly.

On June 28, 2017, counsel for defendants emailed a proposed mutual release to counsel for plaintiff.

Instead of signing the release, plaintiff's counsel sent defendants' counsel a counter-proposal for a mutual release that eliminated "a good bit of surplusage" and had been trimmed down to "only the release and a few boiler plate provisions that we are comfortable with." Defendants' counsel responded that the proposal would be reviewed, but pointed out that plaintiff

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[2] This particular contractual provision states:

> Release upon severance. Upon the termination of Dr. Meyer's employment as Chancellor without Just Cause or for Good Reason, and as a pre-condition for receipt of severance, the Board and Dr. Meyer shall execute, and Dr. Meyer shall not revoke, a mutual release of all claims which can be waived by law in a form satisfactory to the College and Dr. Meyer.

had removed matters that are required by law, rendering the release ineffective. Defendants' counsel opined that it was "concerning" that plaintiff "would risk and now delay the consideration at stake by referring to language required by law as 'surplusage.' " The parties' emails suggest that they were also discussing or negotiating other matters at the time.

On July 5, 2017, defendants' counsel sent plaintiff's counsel the following email:

> Your client's employment as Chancellor ends effective tomorrow and severance is conditioned upon a release. What you took out of the release we tendered rendered it ineffective as a release of an older worker's claim (both the legally required reference to the relevant statute and the consideration and revocation periods were removed and there would have been ample time for their effectuation before the 6th had they been left in based upon the date of our tender of the proper release to you). There is still time for your client to execute the release we tendered. These facts will be front and center should you follow through with your threat of litigation.

Plaintiff's counsel responded,

> The older workers claim language was deleted by mistake. We are willing to put it back in. But, as already stated we will not agree to language that was in your draft and went far beyond what was agreed upon by the parties in the employment agreement.
>
> In addition, we are aware of what we consider to be serious mis behavior connected to the effort to terminate our client's employment agreement. Therefore, we intend to challenge the legality of that action and associated wrong doing.
>
> As always, our preference is to resolve differences informally, if possible.

To which defendants' counsel responded,

> Your refusal to sign a release in order to preserve the right to litigate a claim that would otherwise be released by it is your or your client's decision but severance is conditioned upon a mutual release. You can't have it both ways.

We have found nothing in the record or the briefs explaining what, exactly, plaintiff found objectionable about defendants' proposed release.

On July 7, 2017, defendants tendered to plaintiff a first payment of severance, and in a letter explained that it was doing so "without waiver of the release precondition and solely in mitigation of" any possible exposure to liability. The letter further stated that any further payments would also be "in accordance with the need to mitigate or the terms of the Employment Contract, none of which are hereby waived." The letter indicated that plaintiff had not complied with other terms in the employment contract pertaining to employment opportunities. The letter indicated that

> In addition, this severance is being tendered in accordance with at least the release Dr. Meyer agreed he would sign as indicated in your email to me on Friday, June

> 30, 2017, without waiver of the College's right to a full release, and in full reliance on your representation that the removal of the mandatory language necessary for a release of a [sic] older worker's claim was a "mistake".

Finally, the letter reiterated that defendants were not waiving the terms of the employment contract. Defendants' counsel also sent plaintiff's counsel an email alerting counsel to the payment and letter.

On July 19, 2017, OCC made a second severance payment to plaintiff, and defendants' counsel contemporaneously sent plaintiff's counsel the following email:

> This is to advise you that my client has mailed a second severance payment to your client subject to the same terms and conditions accompanying the first payment and which were communicated to you by me. Copies of each of those payments are attached hereto. In addition and unless a release is executed as per the terms of the contract, my client may decide to withhold future payment of the portions of its severance payment obligations that are payable to your client. I am happy to discuss any draft release you tender in response to the one we tendered to you weeks ago once it includes the language you claim was removed by mistake that is legally necessary to release an older worker claim. In addition, I am also happy to discuss alternatives to my client's severance and other obligations pursuant to the contract should that be of interest to your client.

Attached to the email were what appears to be two checks, in the amount of $5,801.36 and $5,948.52.

On August 2, 2017, defendants' counsel sent another email to plaintiff's counsel:

> As per our numerous, previous warnings and notices, please be advised that the College will be withholding the net portion of severance payments which would otherwise have been payable and sent to your client had the contractual contingencies for same been fulfilled. Given your client's apparent refusal to execute a release compliant with the referenced contract and despite tender of same by the College to you, your client is not entitled to the severance provided in the referenced contract and my client is under no obligation to mitigate the consequences of your client's choice.
>
> Please also be reminded that we still have not received an official transcript from you for your client. On our last call, you agreed that an official transcript is a necessary document to assess your client's eligibility for a faculty position should he decide to avail himself of that opportunity in accordance with the contract. You have been repeatedly notified that the College does not have an official transcript for your client. The College can only assume that your client's failure to proceed in this regard and in accordance with the contract means that he has no interest in being considered.

No direct response to the above email appears to be included in the record. Defendants apparently made a conclusive determination on August 10, 2017, that plaintiff had waived his faculty appointment option.

On August 22, 2017, defendants' counsel sent plaintiff's counsel an emailed "reminder" that plaintiff's sons were ineligible for a tuition waiver until the release was signed and that they would be deregistered on August 29 unless tuition was paid. It is not clear if plaintiff responded to that email. On September 5, 2017, plaintiff's counsel sent defendants' counsel a proposed "redline version" of the proposed release agreement, but also stating that

> Dr. Meyer is willing to execute the attached redlined version provided the college is willing to abide by the terms of the contract, including: (1) payment for all amounts owed to Mr. [sic] Meyer, including monthly payments and accrued and owing vacation days, minus the two severance payments already paid; (2) confirmation Dr. Meyer will continue with the college as an administrative employee and will receive all benefits owed to administrative employees; (3) additional severance payments for eighteen months beyond the contractual 18 months the parties have already agreed upon; and (4) the purchase of two years of universal buy-in credits in the college's pension plan. In exchange, Dr. Meyer will not seek a teaching position with the college and will sign the attached release.

The only copy of that release we have found is a black-and-white scanned image, so we do not know what changes were proposed. In response, on September 13, 2017, defendants' counsel indicated that the release itself proffered by plaintiff was acceptable, but:

> Other than your references to disagreement and to protracted litigation, I was encouraged by your premising your client's willingness to execute the tendered release on "the college [being} [sic] willing to abide by the terms of the contract." This has always been the College's position and remains so. However, the contract also dictates what terms apply if the release is not executed. My client intends to abide by the terms of the contract, as it has been doing, whether or not your client executes the release required for the contract severance benefits. To date, your client has not been willing to execute and, in any event, has not executed the required release despite the College's tender of same a long time ago.. [sic] The release you tendered is acceptable per the terms of the contract and once executed by your client will be executed by mine as per the terms of the contract and, thereby, will trigger the contract severance benefits conditioned upon the release.. [sic] My client is willing to do so because that is precisely what the contract calls for. I have no idea what litigation could possibly arise or have arisen at this point since my client has meticulously abided by its obligations pursuant to the contract at all relevant times. Unfortunately, and as I read further, your email seems to condition your client's willingness to execute the release on terms and conditions not contained in or provided by the contract. My client's position remains: It will continue to abide by the contract and its requirement of a release as the condition precedent to your client's receipt of the severance benefits that are conditioned upon the release. I must also caution that should your client resort to litigation, my client will seek sanctions since it is not in breach of the contract and it will be the

> contract that controls and which will bar any noncontractual claim. There being no problem with the release you tendered, it remains your client's choice as to whether or not to execute it.

The parties do not provide any indication of what further communications, if any, they might have had until plaintiff filed his first complaint.

Plaintiff filed his complaint in *Meyer I* on March 21, 2018. Plaintiff alleged that defendants violated the parties' contract by converting the term of his employment, purporting to terminate his employment without proper notice, and failing to fully effectuate his termination. He also alleged that defendants violated the Open Meetings Act (OMA), MCL 15.261 *et seq*., by voting on his termination during a closed session. Finally, plaintiff contended that even if he did not have "any legal claims against the Board," he was entitled to severance benefits under ¶ 8 of the contract,[3] salary and fringe benefits under the contract, and statutory damages under the OMA. In lieu of an answer, on April 30, 2018, defendants moved for summary disposition, arguing that plaintiff had failed to state any claim for breach of contract or violation of the OMA, his OMA claim was barred by the applicable statute of limitations, and in any event the Board's closed session was proper and the vote to terminate plaintiff's employment was open.

On May 21, 2018, defendants' counsel then sent a settlement letter to plaintiff's counsel. The letter reminded plaintiff that "as a condition precedent to receiving severance, Dr. Meyer was obligated to execute a mutual release," which plaintiff had not done despite the parties' negotiation of a release and Dr. Meyer's "agree[ment] to the terms and form of the release in principle." The letter further pointed out that by deciding to commence suit instead of executing the release, plaintiff "wrongfully refused to satisfy a condition precedent" and "rendered any release of the then waivable claims impossible." Furthermore, pursuant to MCR 2.203(A), plaintiff necessarily waived any other claims he might have had "arising out of or related to his employment with OCC" that he had not joined to the action. The letter stated that "[t]he severance was consideration in avoidance of the very thing Dr. Meyer caused to happen – filing a lawsuit." The letter concluded by indicating that defendant's counsel would recommend to his client that plaintiff's severance be resurrected if plaintiff were to fully execute the agreed-upon release and withdraw or dismiss the action with all costs and fees to be deducted against his severance. Plaintiff clearly did not accept defendants' invitation.

The trial court granted summary disposition in favor of defendants on September 13, 2018. On appeal, this Court explained:

> In a September 13, 2018 opinion and order, the trial court found that defendants did not breach the termination provision of the employment contract and that plaintiff did not establish any damages for any breach of the contract. The trial court further found that it was without jurisdiction to grant plaintiff's requested relief with respect to its claim concerning the OMA and that plaintiff's allegations as stated in his complaint do not set forth a violation of the OMA. The trial court thus granted

[3] As we will discuss, ¶ 8 governs plaintiff's entitlement to payment, benefits, or anything else in the event of his termination.

> defendants' motion for summary disposition. [. . .] [*Meyer I*, unpub op at pp 1-2 (footnotes omitted).]

Plaintiff filed his claim of appeal in this Court in *Meyer I* on October 3, 2018.

Shortly thereafter, on October 31, 2018, defendants sent a letter to plaintiff stating, in relevant part,

> As previously advised, due to Dr. Meyer's failure to execute and return to the Board the mutual release of claims required pursuant to paragraph 8.D. of the Chancellor Employment Contract which became effective January I, 2012 (the "Contract"), and his subsequent decision nullifying that option, the protective/mitigating payments that the College has been holding pending receipt of the executed mutual release will be voided. As a result, Dr. Meyer's date of termination is July 6, 2017 (the "Termination Date"). A revised IRS form W-2 will be issued for 2017 reflecting compensation paid to, or on behalf of, Dr. Meyer through the Termination Date, including any amounts in 2017 that were paid directly to Dr. Meyer after the Termination Date. A check will be issued in December for the net amount of Dr. Meyer's vacation pay-out after reductions for the employee portion of health care coverage costs for 2017 and 2018, the contributions made into Dr. Meyer's health savings account for years 2017 and 2018, and any other amounts paid to or on behalf of Dr. Meyer after his Termination Date.

The letter further explained that plaintiff's retirement accounts were being removed, and his insurance coverage would cease, but he would be sent COBRA information. The letter concluded that plaintiff should not contact defendants directly for any reasons unrelated to COBRA or plan conversion or portability rights, and any other communication should only be through counsel. On December 20, 2018, defendants' vice chancellor for administrative services sent plaintiff a check for $19,656.70, representing his net vacation payout, a worksheet explaining how that amount was calculated, and an amended W-2 form for 2017. The cover letter explained that "[t]he protective/mitigating payments that the College had been holding pending receipt of the executed mutual release have been removed from this W-2" and that he would be issued a 2018 W-2 reporting the vacation payout.

On March 20, 2019, while his appeal in *Meyer I* was still pending in this Court, plaintiff filed his complaint in the instant matter, again alleging breach of contract. The parties named in the complaint were identical to the complaint in *Meyer I*, and the transaction that gave rise to both suits was the same termination of plaintiff's chancellorship. As noted, plaintiff's prior breach of contract claim was premised in part on the allegation that he had not actually been properly terminated. In contrast, plaintiff's present action presumes his termination and instead contends that he is entitled to the severance benefits set forth in ¶ 8 of the contract. Plaintiff further contends that his entitlement to those benefits was conditional upon execution of a mutual release between the parties, which plaintiff was willing to sign, but that defendants were nevertheless refusing to pay his benefits.

Defendants moved for summary disposition, correctly pointing out that plaintiff's prior complaint had *also* asserted entitlement to the severance benefits in ¶ 8 of the contract. Defendants

also pointed out that the prior action had been adjudicated and dismissed on its merits and involved the same parties, thus clearly establishing two elements for *res judicata*. Defendants further argued that both actions arose out of the same transaction or occurrence. Plaintiff tacitly agreed that both claims generally arose out of his termination, but he argued that he could not have brought the instant breach of contract claim at the time he commenced the prior action, because at that time he was still receiving salary and fringe benefits, the parties were still negotiating terms of a mutual release, and defendants did not adopt the position that plaintiff was not entitled to his severance until October 31, 2018. Plaintiff thus concluded that defendants had not actually breached ¶ 8 of the contract until after his first action had already been dismissed.

On July 10, 2019, the trial court rejected plaintiff's arguments and granted summary disposition in favor of defendants. As noted above, the trial court's reasoning was twofold. First, plaintiff's prior action had been litigated to finality, and plaintiff could and should have brought the instant breach of contract claim as part of that action. The trial court observed that plaintiff had only received two severance payments, long before he filed his first complaint. Secondly, even if res judicata was inapplicable, plaintiff waived any entitlement to severance under the terms of the contract. Execution of a mutual release was an express condition precedent, plaintiff had refused to execute any such release agreement, and plaintiff could not do so now after having commenced a lawsuit. This appeal followed.

In the meantime, *Meyer I* was released on January 7, 2020. This Court concluded that plaintiff's breach of contract claim, premised on defendants' failure to comply with certain timing and notice provisions in the contract, had been properly dismissed as clearly unenforceable. *Meyer I*, unpub at pp 3-5. This Court partially affirmed the grant of summary disposition as to plaintiff's OMA claim, to the extent plaintiff sought to invalidate the Board's decision to terminate his chancellorship or sought injunctive relief. *Id*. at pp 5-9. However, this Court found that plaintiff had validly pleaded a claim for statutory damages under the OMA, so it partially reversed the trial court's grant of summary disposition under MCR 2.116(C)(8) on that limited basis. *Id*. at 8-9. Plaintiff applied for leave to appeal to our Supreme Court, which denied plaintiff's application on September 29, 2020.

II. ISSUE PRESERVATION AND STANDARDS OF REVIEW

Issues are preserved for appeal if they are raised in the trial court and directed to the trial court's attention, irrespective of whether the trial court addresses them. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Not all of plaintiff's arguments were raised in the trial court. However, "[t]he purpose of the appellate preservation requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice." *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). Some of plaintiff's arguments could not have been made until this Court decided *Meyer I*, and the date of this Court's decision was obviously not under plaintiff's control. The issue preservation requirements do not require parties to perform impossibilities. *Lee v Marsh*, 19 Mich 11, 13 (1869). Under the circumstances, plaintiff's failure to raise these issues below could hardly be considered harboring error as an appellate parachute. Cf. *Kinney v Folkerts*, 84 Mich 616, 625; 48 NW 283 (1891). Under unusual circumstances where an issue could not have been raised below for reasons outside the appealing party's control, we are inclined to consider it in the interests of justice to overlook the issue preservation requirements. See *Steward*

v Panek, 251 Mich App 546, 554; 652 NW2d 232 (2002). Furthermore, the issue preservation requirements generally permit parties to make better-developed arguments on appeal than they made below. See *id*.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*. at 119. Under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. The interpretation and application of statutes, rules, and legal doctrines is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). "Moreover, questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). "The question whether res judicata bars a subsequent action is reviewed de novo by this Court." *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004).

III. EFFECT OF PARTIAL REVERSAL ON RES JUDICATA

Plaintiff argues that the trial court erred in basing its grant of summary disposition on res judicata, because this Court in *Meyer I* partially reversed the trial court's judgment in his first action. Therefore, plaintiff argues that the judgment in the prior action is no longer "final" and can no longer have preclusive effect. We disagree.

Our Supreme Court has summarized the doctrine of res judicata as follows:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Adair*, 470 Mich at 121 (citations omitted).]

"A party may invoke the doctrine [of] res judicata only when the previous decree is a *final* decision." *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994) (emphasis in original). Although we have found little case law directly addressing plaintiff's argument, it is clear that he conflates the concept of a final determination with a final order.

Importantly, this Court in *Meyer I* actually affirmed the trial court's dismissal of plaintiff's breach of contract claims and OMA claims seeking to invalidate defendants' actions. *Meyer I*, unpub at p 8. The partial reversal pertained only to whether plaintiff could seek statutory damages under the OMA. *Id*. The instant action has nothing to do with the OMA. Thus, the partial reversal upon which plaintiff relies did not substantively affect, or even pertain to, the claims at issue in

this matter. Plaintiff's claims in the instant matter sound entirely in breach of contract. Plaintiff does not, and could not, dispute that the two actions involve the same parties, the same contract, and at least generally the same transaction.

A "final order" or "final judgment" is defined by MCR 7.202(6) for purposes of whether a particular order is appealable of right to this Court. Notably, not all of the enumerated definitions substantively constitute final determinations of the merits of a dispute. For example, MCR 7.202(6)(a)(v) includes certain denials of summary disposition based on governmental immunity. Under MCR 2.604(B), incorporated by reference by MCR 7.202(6)(a)(ii), in certain circumstances trial courts may designate "an order entered before adjudication of all of the claims and rights and liabilities of all the parties" as a "final order." In contrast, an order that is not technically a "final order" might be truly "in substance and effect a final determination of the case." See *Wanner v Martin*, 173 Mich 503, 504; 139 NW 249 (1913). Notably, the courts seek to refrain from elevating technicalities over substance. See *Hartford v Holmes*, 3 Mich 460, 463 (1855); *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). The definitions found in MCR 7.202(6) are, in any event, intended as a procedural mechanism for regulating appeals. See *City of Detroit v State*, 262 Mich App 542, 545-546; 686 NW2d 514 (2004). A "final order" within the meaning of MCR 7.202(6) is therefore not necessarily synonymous with a final substantive determination of the issues.

We also observe that our Supreme Court has historically tended to refer to "issues," "matters," or questions" having been decided to finality for purposes of res judicata. See *Curry v City of Detroit*, 394 Mich 327, 332 n 7, 333; 231 NW2d 57 (1975); *Strech v Blissfield Community Sch Dist*, 357 Mich 620, 623; 99 NW2d 545 (1959); *Gursten v Kenney*, 375 Mich 330, 333-335; 134 NW2d 764 (1965). The United States Supreme Court has also referred to res judicata as having a preclusive effect upon issues. *Federated Dep't Stores, Inc v Moitie*, 452 US 394, 398; 101 S Ct 2424; 69 L Ed 2d 103 (1981). The most obvious implication is that the preclusive effect of a judgment depends on whether the relevant subject-matter (whether called an issue, question, matter, or similar terminology) has become final; not whether the entire order is technically intact.

The Sixth Circuit has specifically held that a partial reversal of a judgment does not deprive any unreversed portions of the judgment of preclusive effect. *FCA US, LLC v Spitzer Autoworld Akron, LLC*, 887 F 3d 278, 289-290 (CA 6, 2018). "Opinions of the lower federal courts and foreign jurisdictions are not binding but may be considered persuasive." *People v Patton*, 325 Mich App 425, 434 n 1; 925 NW2d 901 (2018). The holding in *Spitzer* appears consistent with binding historical case law from our Supreme Court. Furthermore, it clearly furthers the purpose of res judicata: avoiding "multiple suits litigating the same cause of action." *Adair*, 470 Mich at 121. Likewise, it is consistent with the general principle of focusing on substance rather than technicalities. We therefore adopt the above holding from *Spitzer*. Thus, the partial reversal of the trial court's judgment in the previous case as to substantively irrelevant matters had no effect on whether the rest of the judgment may be invoked for res judicata purposes.

IV. ACCRUAL OF INSTANT CLAIMS

Plaintiff next argues that even if res judicata is applicable in general, his instant claims arise out of discrete breaches of the contract that had not occurred until after the trial court granted

summary disposition in his first action. We disagree that plaintiff's claims did not accrue before the commencement of his first action.

Plaintiff correctly states that, in general, "a cause of action for breach of contract accrues when the breach occurs, i.e., when the promisor fails to perform under the contract." *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 245-246; 673 NW2d 805 (2003). Plaintiff also argues that the relevant portion of the parties' contract is an "installment contract," because it specifies that individual payments are to be made and accepted separately at intervals. See *Twichel v MIC General Ins Corp*, 469 Mich 524, 532 n 5; 676 NW2d 616 (2004).[4] "The claims on an installment contract accrue as each installment falls due." MCL 600.5836. Thus, plaintiff argues that a new breach occurred every time defendants "missed" one of the severance payments to which he claims entitlement.

However, plaintiff overlooks two significant additional legal principles. First, where a party to a contract has unequivocally manifested an intent not to perform, the other party may commence a breach of contract action immediately. *Paul v Bogle*, 193 Mich App 479, 493; 484 NW2d 728 (1992). Secondly, a claim for declaratory judgment may be commenced when there is an actual controversy between the parties that realistically threatens to become an accrued claim and a declaratory judgment would be useful and necessary for the parties to protect their rights or to avoid losses or damages. *City of Flint v Consumers Power Co*, 290 Mich 305, 308-311; 287 NW 475 (1939); *Durant v State*, 456 Mich 175, 208-209; 566 NW2d 272 (1997). Likewise, "injunctive relief is sometimes available when a tort is merely threatened." *Adkins v Thomas Solvent Co*, 440 Mich 293, 315; 487 NW2d 715 (1992). Although a party may ordinarily also have the option of waiting to bring suit, at issue for res judicata purposes is whether plaintiff *could* have commenced his claims.

Plaintiff was unambiguously and unequivocally informed no later than August 2, 2017, that defendants had deemed plaintiff to have waived any entitlement to any severance based on his refusal to execute a release, and that no further payments would be forthcoming. Defendants' email invited no further negotiations and was plainly final. Furthermore, plaintiff had been equally-clearly informed that his two severance payments were solely for mitigation purposes and made with a full reservation of rights—clearly implying that defendants might seek to recoup those payments at a later date. Thus, plaintiff had the immediate ability to commence a breach of contract claim for *all* unpaid severance payments, and he also had the ability to commence a declaratory judgment action seeking a ruling that he would be entitled to those payments in the event his termination was legally effectuated.

Plaintiff argues that there is some significance to the fact that the W-2 form originally issued by defendants for 2017 indicated that the entire amount of his salary had been paid. Plaintiff does not explain why a W-2 form issued for income tax purposes should overcome defendants' unambiguously manifested repudiation of further payments. Indeed, it seems far more likely that defendants were simply exercising caution to avoid possibly having underpaid its withholding obligations. Doing so would be consistent with defendants' payments initially made for purposes

[4] For purposes of argument and resolving this appeal, we choose to accept this assertion at face value, but we do not actually decide whether it is true.

of mitigation. Relying on the ambiguous W-2 rather than defendants' clearly-stated letters and emails would seem to be an exercise in willful ignorance. Plaintiff is simply wrong that he could not have brought claims based on unpaid severance payments in his first action.

Defendants correctly observe that plaintiff was fully permitted to argue in the alternative that he had not been properly terminated *and* that he was entitled to the severance payments if the court found that he had been properly terminated. See MCR 2.111(A)(2); *AFSCME Council 25 v Faust Public Library*, 311 Mich App 449, 459; 875 NW2d 254 (2015). Plaintiff's argument to the general effect that he could not have asserted entitlement to severance benefits while contending that he had not actually been terminated, or that defendants could not argue that plaintiff's claim accrued while arguing that defendants had not breached the contract, is incorrect.

More reasonably, plaintiff distinguishes severance "payments" and severance "benefits." Defendants did continue furnishing plaintiff with medical, dental, and vision insurance coverage until October 31, 2018. We note that "actions sometimes speak louder than words" in determining intent. See *People v Quigley*, 217 Mich 213, 218; 185 NW 787 (1921). Because defendants continued providing plaintiff's fringe benefits, unlike his severance payments, it would not be reasonable to find that defendants had engaged in anticipatory repudiation of plaintiff's alleged rights to those fringe benefits. *Paul*, 193 Mich App at 493-494.

Nevertheless, plaintiff was obviously aware that there was an "actual controversy" as to his entitlement to anything under ¶ 8 of the contract. Even if defendants had not actually ceased making benefit payments or expressly manifested an anticipatory repudiation of those benefit payments, plaintiff should have been aware that their viability was in grave doubt. Indeed, plaintiff specifically asserted in his first complaint that he was entitled to both severance payments and fringe benefits under the contract, even in the event he had no legal claims against defendants. Furthermore, there does not appear to be any sound basis for a potential holding that plaintiff was entitled to, say, severance payments but not insurance benefits, or vice versa, under the contract: the various severance benefits were inextricably interlinked. Thus, plaintiff's entitlement to severance benefits, even if no breach of contract had yet occurred, still should and could have been resolved in the first action.

In summary, res judicata was properly applied to preclude the instant action.

V. FAILURE OF CONDITION PRECEDENT

Plaintiff next argues that the reason why he never signed the mutual release, which was a condition precedent for his entitlement to severance, was because defendants were attempting to force plaintiff to give up his right to a faculty position. The evidence unambiguously shows the opposite.

The contract never provided plaintiff with a truly absolute right to a faculty position after termination. Pursuant to ¶ 4.H, plaintiff's entitlement to a faculty position was dependent upon the existence of "a curriculum relevant to the current OCC academic program for which he is qualified" and a written election by plaintiff within 30 days after his termination. Additionally, his severance payments, if any, would be reduced by the amount of pay he received from any such faculty position. On August 2, 2017, in the same email stating that defendants would withhold

further severance payments, defendants reminded plaintiff that OCC needed an official transcript in order "to assess [plaintiff's] eligibility for a faculty position should he decide to avail himself of that opportunity in accordance with the contract." The email further stated that defendants had repeatedly told plaintiff that OCC lacked the necessary transcript and was forced to assume that plaintiff's inaction meant he was uninterested in a faculty position. As of that date, the evidence therefore shows that defendants were not endeavoring to deprive plaintiff of a faculty position, notwithstanding his failure to execute a release. Rather, plaintiff's own inaction was the only impediment to obtaining the faculty position.[5]

We also take note that on August 3, 2020, plaintiff filed a complaint in the United States District Court for the District of Columbia alleging a single count of legal malpractice against one of his attorneys involved in the negotiations with defendants. In that complaint, plaintiff alleges that he repeatedly told his attorneys that he wanted the faculty member appointment, but his attorneys failed to provide the proper notice of election to OCC. Significantly, plaintiff alleges that on August 10, 2017, OCC conclusively determined that plaintiff had waived his option to a faculty appointment. No email, letter, or other communication dated August 10, 2017, has been provided to this Court. Plaintiff alleges in the federal complaint that it was his attorneys' actions or inactions that cost him the faculty appointment.

We disagree with defendants' argument that plaintiff is conclusively bound by his above allegations and that they are incompatible with any claim that defendants had any responsibility for plaintiff's failure to obtain the faculty appointment. Rather, plaintiff's allegations are admissible into evidence against him as admissions against interest, but they are not *per se* conclusive in the nature of estoppel. *Guarantee Bond & Mortgage Co v Hilding*, 246 Mich 334, 344; 224 NW 643 (1929); *Ledger v Northwestern Mut Life Ins Co*, 258 Mich 26, 30-31; 241 NW 803 (1932). As noted, parties may plead theories in the alternative. We do not consider plaintiff bound by any conclusions set forth in his federal complaint. However, the alleged August 10, 2017, determination explains some of what happened after the August 2, 2017, email in which defendants advised plaintiff that plaintiff appeared to have waived his faculty appointment. We do regard that factual allegation as having evidentiary value.

The available evidence thus indicates that, far from refusing to negotiate or trying to preclude plaintiff from his faculty appointment, defendants went to commendable effort to ensure plaintiff's appointment within the terms and conditions of the contract. Rather, plaintiff (or his attorneys) failed to comply with the conditions in the contract that were prerequisites to that appointment. Indeed, even if the federal complaint is ignored, no reasonable inference from the evidence could possibly support plaintiff's purported version of events.

Aside from the alleged August 10, 2017, determination, there is no evidence of what (if any) conversations plaintiff's counsel and defendants' counsel may have had regarding the faculty appointment. The next event for which there is any evidence is a September 5, 2017, email from plaintiff's counsel proposing an edited waiver and changed contractual terms, which included

[5] We have not been directed to any evidence suggesting that plaintiff was qualified for any faculty position. However, for purposes of resolving this appeal, we will presume without deciding that if plaintiff had provided his transcript, an appropriate faculty position would have existed.

doubling the length of his severance payments in exchange for plaintiff foregoing a faculty position. If plaintiff had already missed the deadline for his election due to his own failure to comply with the contractual prerequisites, his offer would be an impressive display of chutzpah. In any event, however, the email only shows that plaintiff proposed to defendant a radical departure from the terms of the contract—which defendant had already repeatedly explained it intended to comply with precisely—in exchange for foregoing a conditional right to which he now contends he was entitled. Even further, defendants' response to the September 5 email was that defendants intended to remain with the contract as it was written, but that they considered plaintiff's proposed release acceptable and would sign it after plaintiff did so. Clearly, defendants attempted to be reasonable and merely refused to renegotiate the contract itself.

Plaintiff argues that a party's refusal to negotiate a contractual term that calls for mutual agreement can constitute a waiver of a condition precedent. See *Mehling v Evening News Ass'n*, 374 Mich 349, 350-352; 132 NW2d 25 (1965). The contract, however, provides no mutual-agreement term regarding plaintiff's faculty appointment. We have not been made aware of any authority obligating defendants to negotiate any alteration to the contract. The contract provides only a limited opportunity for negotiating the terms of the release by requiring "a mutual release of all claims which can be waived by law in a form satisfactory to the College and Dr. Meyer." The phrase "all claims which can be waived by law" does not strike us as ambiguous, and the evidence shows that plaintiff sought to alter the substance of the release rather than merely dispute the form. In other words, plaintiff clearly insisted on trying to renegotiate matters upon which defendants simply had no obligation to respond.

There is no plausible way to view the evidence, with or without consideration of the federal complaint, as showing that defendants engaged in any obstructive conduct. The only possible "obstruction" in which defendants engaged was refusing to entertain proposals to depart from the terms of the contract, which can hardly constitute a breach of the contract or a true obstruction. Plaintiff seemingly gambled on trying to demand more than the contract provided, and only his own irresponsible conduct is what cost him his severance benefits.

VI. WAIVER OF CONDITION PRECEDENT

Finally, plaintiff argues that even now, it is not too late for him to execute a mutual release, so he cannot have waived his rights under the contract. Plaintiff essentially seeks to eviscerate the clear intent of the contract by reliance on terminology. We disagree with both the substance and the technicalities of plaintiff's argument.

Plaintiff correctly observes that a "release" and a "covenant not to sue" are different kinds of instruments with somewhat different effects:

> A release immediately discharges an existing claim or right. In contrast, a covenant not to sue is merely an agreement not to sue on an existing claim. It does not extinguish a claim or cause of action. The difference primarily affects third parties, rather than the parties to the agreement. [*J&J Farmer Leasing, Inc v Citizens Ins Co of America*, 472 Mich 353, 357-358; 696 NW2d 681 (2005).]

The latter point about third parties refers to the fact that the distinction historically was highly relevant in a joint-tortfeasor context, but holds less significance today. See *Industrial Steel Stamping, Inc v Erie State Bank*, 167 Mich App 687, 693-694; 423 NW2d 317 (1988). "As between the parties to the agreement not to sue, the final result is the same as if a release is given." *Larkin v Otsego Mem Hosp Ass'n*, 207 Mich App 391, 393; 525 NW2d 475 (1994). Plaintiff points out that "a release is generally thought to operate retrospectively" and affect only existing claims. *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 387 n 8; 525 NW2d 891 (1994). However, calling a covenant not to sue prospective is misleading, because it also pertains to "an existing claim." *J&J Farmer Leasing*, 472 Mich 357-358.

In any event, the label given to a particular instrument does not conclusively establish the nature of that instrument. Rather, the courts look to the underlying substance to determine its nature. *In re Traub Estate*, 354 Mich 263, 278-279; 92 NW2d 480 (1958); *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958). Indeed, the legal effect of a contractual provision is a question of law for the courts to resolve. See *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). This Court has suggested that it might "be helpful to reserve use of the term 'release' to" discharges of existing obligations, because "a release is generally thought to operate retrospectively." *Cudnik*, 207 Mich App at 387 n 8. However, this Court found the use of a technically incorrect term to be merely "somewhat confusing," not dispositive. *Id.* The parties' intent, as discernable from the agreement as a whole, is not necessarily dictated by the terminology used if the terminologies themselves are somewhat vague. It is clear that the goal of the parties' release clause in this matter, whatever language used, was to ensure that neither party could pursue any claims against each other thereafter to the extent legally permissible.

There is no absolute bar to parties contractually agreeing to waive liability for conduct that has not yet occurred and might not occur. See *Skotak v Vic Tanny Internat'l, Inc*, 203 Mich App 616, 617-618; 513 NW2d 4228 (1994). Public policy precludes such contractual waivers for gross negligence or intentional misconduct, but it permits such waivers for negligence. *Klann v Hess Cartage Co*, 50 Mich App 703, 709; 214 NW2d 63 (1973). Although not directly applicable to this matter, the Federal Employers' Liability Act (FELA), 45 USC 51 *et seq*., permits an employer and an employee to negotiate a release from liability for potential harms that might or might not occur in the future, so long as the particular risk was known at the time of the release. *Jaqua v Canadian Nat'l RR, Inc*, 274 Mich App 540, 541-542, 554-555; 734 NW2d 228 (2007). The restrictions on such waivers come from applications of public policy to the particular kinds of claims, not from simply whether the claim has yet accrued. Thus, although not necessarily applicable to this matter specifically, parties clearly can—in principle—waive at least some kinds of claims before those claims have accrued. In other words, there is no absolute bar to a waiver encompassing future conduct or events.

Consequently, the distinction between a "release" and a "covenant not to sue" is only the manner of thereafter precluding a claim, not whether either can waive a party's potential liability for an unaccrued claim. The one discharges a claim, the other declines to prosecute it. *Larkin*, 207 Mich App at 393-394. Thus, as this Court observed, there is no effective difference between a "release" and a "covenant not to sue" as between the parties to the agreement. *Larkin*, 207 Mich App at 393. The only relevant consideration is that the parties' contract in this matter requires the "release" to include "all claims which can be waived by law." Notably, irrespective of whether parties may waive all kinds of claims that have not yet accrued, parties have long been able to

waive claims of which they are unaware. *Skotak*, 203 Mich App at 618-620; *Stolaruk Corp v Central Nat'l Ins Co of Omaha*, 206 Mich App 444, 449-450; 522 NW2d 670 (1994); *In re Saier's Estate*, 342 Mich 587, 590, 593-595; 70 NW2d 823 (1955).

A "waiver is a voluntary and intentional abandonment of a known right." *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). A waiver may be established by words, or it may be inferred from actions or conduct incompatible with performance of a contract. See *Strom-Johnson Const Co v Riverview Furniture Co*, 227 Mich 55, 67-68; 198 NW 714 (1924). Alternatively, a waiver will be implied where a party's actions or conduct would amount to estoppel. *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334, 339; 168 NW 425 (1918). Thus, the inquiry is the extent to which plaintiff's decision to commence suit is irreconcilably incompatible with performance of the release provision of the contract.

It appears likely that, pursuant to plaintiff's argument regarding installment contracts, if plaintiff had promptly signed a mutual release, he would not have been precluded from subsequently asserting breach of contract claims if defendants had thereafter ceased making severance payments.[6] However, he clearly would have been precluded from bringing claims based on defendants' alleged OMA violations or defendants' alleged failure to properly terminate his employment. The fact that the parties' contract specifies the mutual release as a precondition to plaintiff's receipt of severance benefits after a termination without just cause or good reason strongly supports defendants' position that the purpose of the provision is to avoid litigation from even commencing. More specifically, the release provision strongly implies that, if plaintiff was terminated "without Just Cause or for Good Reason," he had a right to elect between *either* suing for improprieties in his termination *or* receiving the severance package, but not both.[7] Consequently, plaintiff's decision to commence suit should be considered so incompatible with performance of the release provision as to effectuate a waiver.

Plaintiff's argument that he could always execute a release at any time misses the point. Plaintiff correctly observes that the contract does not specify when the release must be executed, but rather only that it is a precondition to severance benefits. However, it has long been established that if a contract does not specify, implicitly or explicitly, a time for performance, the law will impute a "reasonable time" based on the particular facts and circumstances of the case. *Jackson v Estate of Green*, 484 Mich 209, 217; 771 NW2d 675 (2009). Although *Jackson* stated that a reasonable time for repayment of a loan is a fact question for the jury, *id*., under the facts of this case, there is no possible factual question to be had. Ordinarily, the law might provide some leeway for a party's substantial performance under a contract, but not if the departure serves "to frustrate the purpose of the contract." *Antonoff v Basso*, 347 Mich 18, 30; 78 NW2d 604 (1956). Having lost two lawsuits against defendants, the first in both the trial and appellate courts, and the second in the trial court, plaintiff now claims that he could still execute a release of his apparently valueless claims. Both lawsuits caused defendants to incur wholly unnecessary expenses and inconvenience. One could choose between two metaphors for plaintiff's position—having it both

[6] We reiterate that we engage in this presumption, but we do not make any such holding.

[7] Although defendants do not appear to have said so in exactly those words, it is clear that defendants maintained this position and communicated it to plaintiff.

ways or having one's cake and eating it too. Plaintiff's suits fundamentally frustrated the purpose of the release provision by causing the harm that the provision clearly sought to avoid. It is impossible now to "unring the bell."

The trial court properly concluded that plaintiff waived the right to execute a release under the contract, which therefore precludes the condition precedent to his entitlement to severance benefits from ever occurring.

We affirm the trial court's grant of summary disposition on the basis of both of the trial court's theories, either of which alone would have been sufficient. Defendants, being the prevailing parties, may tax costs. MCR 7.219(A).

/s/ Michael F. Gadola
/s/ Amy Ronayne Krause
/s/ Colleen A. O'Brien